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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1572

THE STATE OF ARIZONA, Petitioner,

vs.

JANICE WHITTINGHAM and
GREG WHITTINGHAM, Respondents.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA DIVISION ONE, DEPARTMENT A

Respondents assert that a drug that can cause convulsions and death, that also contains other alkaloids about which little was known except that the smallest quantity would cause death within three minutes, is "relatively harmless", and that its use here was safe.

Respondents have never challenged the legitimacy of petitioner's right to regulate the use of this potentially harmful substance having no known medical use or benefit. If, as respondents assert, this substance is so relatively harmless, less dangerous than alcohol or aspirin, why then did they not challenge the petitioner's right to regulate the substance in the first place? Why didn't they contend that there is no legitimate purpose whatsoever to be served by the regulation of this substance by petitioner?

What respondents instead urge is that the Arizona Court of Appeals decision is correct because it now recognizes an exception by case law to the misdemeanor statute, A.R.S. § 36-1061, and further that Arizona is now in accord with two cited examples of an exception for the use of peyote -- California and the Federal Regulations. They did not, however, cite the Court to those jurisdictions not recognizing any exception, such as North Carolina v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966) and the strong indication by the Court in People v. Crawford, 328 N.Y.S.2d 747, 69 Misc.2d 500 (1972). Respondents also say this decision is correct because the manner in which this dangerous drug was used is "safe", the drug is not addictive, and therefore not subject to abuse, even though it has a great potential for harm. The abuse of the substance was noted for this Court in the petition and was a specific finding of fact by the trial court. (See Appendix B, p. 9a)

It is submitted that in fact Arizona is not now in accord with any other jurisdiction, but the

exception which has been recognized by some other jurisdictions has been extended to the point that the door has now been flung wide open.

Under the Arizona Court's decision the test for an exemption is simply (1) the bona fide practice of a religious belief, (2) the use as an integral part of the religious exercise (practice), and (3) the use in a manner not harmful to the public health, safety or morals. (See Appendix C, p. 25a). This Court in Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), cited with approval Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969). Mr. Clark has noted at page 335 the problem inherent in applying the first part of the test outlined by Arizona's Court:

> ". . . there remain two other variables which may affect the court's estimation of the governmental interest. One is the difficulty of distinguishing truly religious objectors from those making false claims. Justice Brennan was able to minimize this problem in Sherbert, since Sabbatarianism is usually associated with other well defined religious beliefs and practices. In different contexts, however, the problem may prove more compelling. In United States v. Leary, the Fifth Circuit expressed concern that the religious use of marijuana

> by some individuals would give rise to fraudulent claims of privilege or greater ease of access to the drug by those not using it for religious purposes:
>
> * * *
>
> In a number of areas where religious beliefs overlap with secular self-interest, and where the sincerity of religious belief may be harder to define than the sectarian belief in the sanctity of the Sabbath, the government may invoke both administrative difficulty and the broad possibility of error as legitimate factors militating against an exemption."

It is clear, as was the case here, that in the face of simple testimony expressing a belief it is a virtual impossibility to disprove that belief and therefore the practice of that belief.

The second part of the test requires only that the use be an integral part of the exercise and not that it rise to the degree of importance that formed a part of the basis for the decision in People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). As Mr. Clark stated at page 362:

> ". . . In People v. Woody[133] the California Supreme Court held that the Native American Church, a

> religious assembly of American Indians, is entitled by the free exercise clause to the use of peyote in religious ceremonies. The court emphasized the essential nature of peyote in the religious life of the Indians:
>
> * * *"
>
> (Emphasis added)

It seems that the Arizona Court in using the term "exercise" is referring to the practice of a religion as opposed to the belief in a religion. Petitioner submits that the incorporation of a dangerous activity into a religious practice has never been recognized as affording that dangerous activity constitutional protection under the free exercise clause.

The burden the Arizona Court has placed on petitioner as it pertains to the third part of the test, i.e., that peyote was used in a manner not harmful to the public health, safety or morals, now is equally insurmountable. It is not enough to show that the substance causes bizarre distortions of perception resembling the symptoms of psychotic behavior, or that it can cause convulsions and death, or that it is subject to abuse. (See Appendix B, pages 6a & 8a). Petitioner must now show that it is "addictive" and apparently that during its use persons actually convulse and die.

Under the test as now set forth by the Arizona Court, enforcement of A.R.S. § 36-1061 becomes impossible and its purpose, the control

of "dangerous drugs", is defeated.

Respondents remark that petitioner is claiming that the Native American Church is open only to American Indians. Nothing could be further from the truth. It is obvious that the reason an exemption has been recognized in jurisdictions other than Arizona is because the users of peyote were a small group of American Indians confined to the Native American Church. As Mr. Clark noted in his article, supra, at page 332, the relatively small number of persons asserting the privilege was important in this Court's decision in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963):

> ". . . In Sherbert v. Verner itself, the Court defined the governmental interest as that in assuring that enough money would be left in the unemployment fund to support claimants against it, and in assuring that employers would not be seriously inhibited in scheduling necessary Saturday work;[28] the possible number of claimants of the privilege figured centrally in the majority's discussion. . . ." (Emphasis added)

Mr. Clark also pointed out:

> ". . . A religious privilege to smoke marijuana might be workable if only a handful of persons in the United States could establish the requisite

religious interest, but absent assurance of this the right probably does not exist. . . ."

Finally petitioner would ask this Court to note the complete silence and absence of any mention whatsoever by respondents of either the denial of equal protection problem presented by the Arizona Court's ruling or the conflict with the Establishment Clause of the First Amendment. Respondents have completely ignored and have made no response to those questions. Petitioner believes that in view of the Arizona Court's decision and all the decisions concerning the Native American Church, the governmental neutrality mandated by the Establishment Clause of the First Amendment, as set forth in Gillette, supra, no longer exists.

CONCLUSION

The crux of the problem is simply that the personal interest of an individual cannot be determined by the Court and therefore the governmental interest must be. By granting the exemption, the Arizona Court has not only effectively defeated the purpose of A.R.S. § 36-1061 and made enforcement impossible but has seriously jeopardized the purpose and enforcement of all other statutes regulating dangerous substances, such as marijuana or LSD.

For all the foregoing reasons, together with those set forth in the petition, the Court should issue a writ of certiorari to review and reverse the order and opinion of the Court of Appeals, State of Arizona, Division One, Department A.

Respectfully submitted,

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3 June 1974